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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

FRED RUCKER,

Plaintiff and Respondent,

v.

TU MY TONG,

Defendant and Appellant.

B206001

(Los Angeles County  
Super. Ct. No. BS108680)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ann I. Jones. Affirmed.

Tu My Tong, in pro. per., for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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## INTRODUCTION

Appellant Tu My Tong appeals from the judgment entered after the trial court confirmed an arbitration award in favor of her former attorney, Fred Rucker, for attorney fees and costs.<sup>1</sup> She contends that the trial court erred in refusing to consider her motions to vacate the award, filed February 5, 7, 11, and 13, 2008. She contends that the award should have been vacated, because the arbitrators failed to determine all issues and refused to allow her interpreter to translate simultaneously throughout the arbitration hearing. Finally, Tong contends that she was prejudiced in the arbitration by the exclusion of material evidence. We reject Tong's contentions and affirm the judgment.

## BACKGROUND

On May 2, 2007, Rucker filed a petition to compel Tong to submit their fee dispute to arbitration. Prior to hearing on the petition, the parties entered into a stipulation to submit their dispute to binding arbitration pursuant to Business and Professions Code section 6200 et seq.<sup>2</sup> The arbitration went forward November 29, 2007, administered by the Los Angeles County Bar Association. The three-arbitrator panel unanimously awarded Rucker \$34,026 in fees and costs.

In January 2008, Rucker filed a petition to confirm the award, which was scheduled for hearing on February 15, 2008. Tong's arbitration counsel withdrew February 4, 2008, and Tong substituted in the case in propria persona. On February 5, 2008, Tong filed a petition to vacate the award and appeared ex parte. Although the proceedings of that date were not transcribed, and the minutes are not included in the appellate record, the same judge presided over the February 15 hearing, and stated then

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<sup>1</sup> Rucker did not file a brief, and has not appeared in this court

<sup>2</sup> Business and Professions Code section 6200 et seq., established a system of voluntary and involuntary arbitration and mediation of fee disputes between attorneys and clients, to be administered by local bar associations. The statute is popularly referred to as the mandatory fee arbitration act, or MFAA. (See, e.g., *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 979.)

that she had denied the ex parte application. Tong served the petition to vacate by mail on February 5, 2008.

On February 7, 2008, Tong filed a document entitled, “Notice of Motion Opposition to Petitioner to Confirm the Award and Respondents’ Petition Requesting to Vacate the Arbitration Award [*sic*] . . . .” The face of the document indicated that the hearing on the motion was scheduled for February 15, 2008. The attached proof of service indicated that the document had been served by mail February 7, 2008.

On February 7, 2008, Tong filed a document entitled, “Notice of Motion to Strike a Cost - Fees - Arbitration Award,” which also indicated a hearing date of February 15. The proof of service by mail was executed February 7, 2008.

On February 11, 2008, Tong filed a document entitled “Notice of Motion Rejection [*sic*] of Arbitration Award,” which included a request for a trial de novo, with a proof of service by mail dated the same day.<sup>3</sup> This motion also indicated a hearing date of February 15, 2008.

On February 13, 2008, Tong filed another “Notice of Motion Rejection [*sic*] of Arbitration Award,” which appears to be identical to the February 11 filing, but with additional evidentiary attachments. Again, the document indicated a hearing date of February 15, 2008. The February 13 document did not include a proof of service.<sup>4</sup>

On February 11, 2008, Rucker received Tong’s filing of February 5, treated it as opposition to his petition to confirm the award, and filed a reply. He also acknowledged that he had received the two documents that Tong had filed February 7, 2008.

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<sup>3</sup> Also attached was a United States Postal Service certificate of mailing dated February 8, 2008.

<sup>4</sup> The document filed February 13, 2008, is reproduced in a 230-page transcript filed with Tong’s motion to augment the record on appeal. The augmented volume included documents dated February 15, 2008, May 14, 2008, and June 13, 2008, obviously not part of the original motion filed February 13, 2008. Because there was no mention of these later documents in the declaration supporting her motion to augment, we disregard them.

Tong included her own declaration in support of her February 5 “opposition.” The declaration -- handwritten in broken English -- is difficult to decipher, but a few pages appear to summarize the merits of her defense in the fee dispute. The remainder concerns the arbitrators’ conduct of the hearing. Tong asserted that she had been denied a fair arbitration hearing due to the lack of timely discovery, the arbitrators’ exclusion of evidence, in one instance by refusing to allow her time to retrieve it from her car, and in another, by excluding the testimony of her third witness, as well as a conspiracy among the attorneys and arbitrators to render the arbitration binding.

Tong also included the declaration of her attorney, Alfred Hakim, who had represented her at the arbitration hearing. Hakim stated that Tong’s interpreter was allowed to translate simultaneously at first, until the arbitrators found it bothersome and one complained of a headache. Tong was then told that she would be allowed to have her interpreter translate whatever she did not understand.

In her first February 7 opposition, Tong argued that the arbitrators exceeded their powers and engaged in misconduct by excluding material evidence and disallowing simultaneous translation by her interpreter. In her second February 7 opposition, Tong argued the merits of her defense at the arbitration hearing, and asserted that the award erroneously included attorney fees.

Rucker filed a reply to the opposition, objecting to it as untimely filed and improperly served. He also included his declaration in which he stated that Tong had been represented by counsel in the arbitration, that the hearing had been continued once to allow Tong additional time to prepare, and that the parties had been notified that each side would be allowed just one hour to present its case. He stated that the excluded witness was called after the expiration of Tong’s hour. He stated that the interpreter was permitted to translate simultaneously, until the arbitrators found it distracting, and then limited him to instances when Tong indicated that she did not understand. Rucker also stated that Tong was permitted several times to retrieve documents from her car.

At the hearing on Rucker's petition to confirm, the court initially stated that the petition was unopposed and would be granted. Appearing in pro. per., Tong requested leave to present two witnesses and a declaration. The court refused the request, as it was untimely and her documents had not been timely served. When Tong asked the court to consider her filings of February 5, 7, and 11, the court pointed out that the February 5 application had been considered ex parte and denied, and that it would not be fair for the court to consider the others. Nevertheless, the court permitted Tong to argue her position, and reviewed the documents during the hearing, despite improper notice to Rucker.

The court found that Tong had agreed to binding arbitration, that she had been represented by counsel throughout the arbitration proceedings, and that she had participated as a witness. The court rejected Tong's attempt to relitigate the arbitrated matters, and refused her proffer of evidence of the merits of the dispute. The court granted the petition and judgment was entered on the award February 15, 2008. Tong filed a timely notice of appeal from the judgment.

## **DISCUSSION**

### ***1. The Court's Refusal to Consider Tong's Motions***

Tong contends that the court erroneously refused to consider her motions to vacate the arbitration award, filed February 7, 11, and 13, and that the court erred in finding that the motions had not been timely filed or served.<sup>5</sup>

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<sup>5</sup> Although unclear, it appears that Tong has also assigns as error the court's refusal to consider the petition to vacate filed February 5, 2008. However, the court had previously considered and denied the February 5 petition to vacate the award, when it was before the court ex parte on that date. A transcript of the ex parte proceedings and the minutes of the ex parte hearing have not been included in the record on appeal. Thus, we presume that the court's order denying the petition was correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) To the extent Tong asked the court to consider the February 5 petition at the February 15 hearing, her request was a renewal of the petition or a request for reconsideration of its previous ruling, without compliance with the requirements of Code of Civil Procedure section 1008. The court acted well within its

The MFAA provides that petitions to vacate binding arbitration awards are governed by the procedural requirements of Code of Civil Procedure section 1285 et seq. (Bus. & Prof. Code, § 6203, subd. (b).) Such petitions must be made upon notice to the other party or parties, and if filed in a pending court action, as in this case, service may be by mail, but must comply with Code of Civil Procedure section 1005. (Bus. & Prof. Code, § 6203, subd. (b).) Tong was required to file and serve her motions at least 16 court days before the hearing, and as she served them by mail, she was required to add five calendar days to such notice time. (Code Civ. Proc., § 1005, subd. (b).) None of Tong's motions was timely filed or served. As the trial court explained to Tong at the hearing, a consideration of untimely motions would deprive the opposing party of due process. (*Jones v. Otero* (1984) 156 Cal.App.3d 754, 757.)

Rucker considered the papers he received as opposition to his petition. Opposition to an application for a court order must be filed at least nine court days before the hearing on the motion, and served by personal delivery, facsimile transmission, express mail, or other means that will ensure delivery no later than the day after filing. (Code Civ. Proc., §§ 1003, 1005, subds. (b), (c).)<sup>6</sup> The February 5 petition was served by ordinary mail 10 calendar days before the hearing, not by any of the means required for opposition papers. All the remaining papers were served less than nine court days before the hearing. Thus, Tong's filings were untimely as motions and as opposition.

Nevertheless, acting within its well-recognized discretion, the court considered Tong's papers as opposition to Rucker's petition to confirm the award, despite her failure

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discretion to refuse to consider the request. (*Berman v. Health Net* (2000) 80 Cal.App.4th 1359, 1369.)

<sup>6</sup> Tong represented to the court that she served the February 5 petition by facsimile. However, the proof of service indicates service by mail. On appeal, Tong claims that she faxed her papers in opposition, but all the proofs of service in the appellate record show service by mail.

to file and serve them before the expiration of the required time limits.<sup>7</sup> (See *Iverson v. Superior Court* (1985) 167 Cal.App.3d 544, 549.) Tong has suffered no prejudice from the court's refusal to consider her papers as motions, because a request to vacate an award may be made in the opposition to a petition to confirm it. (Code Civ. Proc., § 1285.2.)

Tong complains about the scant time which the court gave to her late-filed papers in opposition to Rucker's petition. She suggests that the court merely skimmed the papers, because it read them for the first time during the hearing, which lasted 25 minutes -- insufficient time, she contends, to give them adequate consideration. However, Tong is not in a position to complain, as she failed to timely file and serve the papers, and did not request an extension of time or a continuance. In any event, the court did consider her contentions after permitting her to argue at length, and she has not pointed to any contention in her papers that she was unable to bring to the attention of the court. Tong has not shown that the court's review of her papers resulted in a miscarriage of justice; thus, she has not carried her burden to establish an abuse of discretion. (Cal. Const., art. VI, § 13; *Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 566.) Indeed, the transcript of the hearing reflects that the trial court had a full understanding of all issues raised by Tong and showed great patience in hearing Tong's arguments.

## ***2. Issues Necessary to the Determination of the Award***

Tong contends that the trial court erred in refusing to vacate the award on the ground that the arbitrators failed to decide two of the issues before them. One such issue, Tong contends, concerned a lien that Rucker filed in one of the cases that Rucker had handled for her. The other issue was whether she should receive a credit or refund of her initial \$5,000 retainer.

Tong points to the arbitrators' acknowledgement in the award that Tong had objected to the lien. Tong contends that this acknowledgement shows that the lien was in

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<sup>7</sup> The court described the opposition papers as consisting of about 50 handwritten pages, which suggests that it considered more than one of the filings.

issue at the arbitration hearing, and that the arbitrators should therefore have reached it. In MFAA arbitration, arbitrators are not required to reach an issue simply because one of the parties introduces it; they are required to reach only those issues that are *necessary* to the determination of the controversy. (Bus. & Prof. Code, § 6203, subd. (a).) Tong has made no attempt to show that any issue regarding the lien was necessary to the determination of the fee dispute.

Tong contends that filing the lien was a breach of the parties' contract. However, in an MFAA arbitration, the arbitrators' sole task is to determine the amount, if any, of fees and costs that are owing to an attorney from his or her client. (Bus. & Prof. Code, § 6200, subd. (a); *Aguilar v. Lerner, supra*, 32 Cal.4th at p. 984.) Evidence of the attorney's misconduct is not admissible in an MFAA arbitration unless it is relevant to the value of the legal services rendered. (Bus. & Prof. Code, § 6203, subd. (a).) Tong could not have recovered damages for a wrongful lien, or an offset from the fees and costs owing to Rucker. (*Ibid.*) As she does not contend that the lien affected the value of Rucker's services, the issue was not necessary to the award.<sup>8</sup>

Tong was entitled to arbitration of her alleged right to a refund of any unearned retainer. (Bus. & Prof. Code, § 6203, subd. (a).) Although she contends that the arbitrators failed to address this issue, the award, in fact, addressed a \$5,000 retainer fee, but the panel found that there was no unearned amount owed to Tong.

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<sup>8</sup> Moreover, the arbitrators did not consider the lien to be a necessary issue. Although they acknowledged in the award that Tong claimed that the lien was wrongful, the panel listed the three issues necessary to its determination, and the lien was not among them. The award listed the following issues: "1. Did [Rucker] perform the services for which [Tong] was billed and meet the professional standards required of counsel? [¶] 2. Should [Rucker] be compensated for acting as counsel in a pending matter after having been substituted out as attorney of record? [¶] 3. Is [Tong] entitled to any credit against unpaid fees in compensation for her claims (defenses) against [Rucker]?"



Tong also contends that Rucker's billing statements failed to reflect her payment of the retainer. However, courts are not authorized to review the arbitration award for factual errors. (*Aguilar v. Lerner, supra*, 32 Cal.4th at pp. 981-982, citing *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11.)

We conclude that the trial court did not err in rejecting Tong's contention that the arbitrators failed to address necessary issues.

### ***3. Simultaneous Translation***

Tong contends that she was substantially prejudiced by the panel's refusal to allow her interpreter to translate the entire proceedings. Tong was permitted to have an interpreter present, but after simultaneous translation became disruptive, Tong was instructed to signal the arbitrators when she did not understand something, and translation would be permitted at that time.

Rule 38.0 of the California State Bar Rules of Procedure for the Hearing of Fee Arbitrations provides that any party to a fee arbitration is entitled to provide an interpreter at his or her own expense. The rules do not guarantee simultaneous translation -- or even mention it. Tong does not contend that the fee arbitration rules of the Los Angeles County Bar Association, which administered this arbitration, gave her the right to simultaneous translation, and did not ask the trial court or this court to take judicial notice of them. Tong had no constitutional right to simultaneous translation. (*People v. Alvarez* (1996) 14 Cal.4th 155, 209.) In court proceedings, when there is a statutory right to an interpreter, the judge may prohibit simultaneous translation and impose reasonable limits, in order to conduct proceedings in an orderly manner. (*Ibid.*) It follows that arbitrators may do the same.<sup>9</sup> We conclude that Tong has not shown that the trial court erred in rejecting Tong's contention.

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<sup>9</sup> Although Tong states the conclusion that she was prejudiced by the limitation, she did not explain to the trial court how she was prejudiced by the limitation, and she does not explain it here.

#### ***4. Exclusion of Evidence***

Tong's final contention is that the trial court erred in refusing to vacate the award due to the arbitrators' exclusion of material evidence. According to Tong's declaration filed with the February 5 ex parte petition, the evidence consisted of her entire file and the testimony of her third witness.

One of the statutory grounds for vacating an arbitration award is a showing that the rights of the party challenging the award "were substantially prejudiced . . . by the refusal of the arbitrators to hear evidence material to the controversy. . . ." (Code Civ. Proc., § 1286.2.) This does not mean, as Tong's argument suggests, that the exclusion of *any* evidence required vacating the award, without a showing of materiality. Tong does not claim to have made an offer of proof at arbitration or to have established materiality in the trial court.

In any event, Tong was required to establish that she was substantially prejudiced by the exclusion of the proffered evidence, before the trial court had any obligation to consider whether the evidence was material to her case. (*Hall v. Superior Court* (1993) 18 Cal.App.4th 427, 438-439.) Tong made no prejudice argument in the trial court, and makes no prejudice argument here. Thus, the court was not required to consider this contention, and did not err in rejecting it.

#### **DISPOSITION**

The judgment is affirmed.

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BAUER, J.\*

WE CONCUR:

RUBIN, ACTING P. J.

FLIER, J.

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\* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.